

CONSTITUTIONS AS COMMODITIES

NOTES ON A THEORY OF TRANSFER

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*ABSTRACT: Constitutional information comes packaged and refers to institutions, norms, principles, doctrines, and ideologies. And for more than two centuries, not counting the crucial influence of previous basic laws or *leges fundamentales*, it has crossed national boundaries, social-cultural contexts, and the limits of epistemic communities. Such information has reappeared for application within different constitutional regimes and different political constellations, resulting from the dynamics of social struggles and accommodating specific economic conditions. And the overall result, given the innumerable variations at play, is striking. Constitutions come for the most part in the form of a written document and contain the legal ground rules for life in society: rights and principles, values and duties, provisions for the organization of government and, with regard to the operative quality of the document, ascertaining its authority, openness to interpretive change or legislative amendment, shifting between stability and flexibility...*

I. CONSTITUTIONS AS COMMODITIES

Constitutional information comes packaged and refers to institutions, norms, principles, doctrines, and ideologies. And for more than two centuries, not counting the crucial influence of previous basic laws or *leges fundamentales*, it has crossed national boundaries, social-cultural contexts, and the limits of epistemic communities. Such information has reappeared for application within different constitutional regimes and different political constellations, resulting from the dynamics of social struggles and accommodating specific economic conditions. And the overall result, given the innumerable variations at play, is striking. Constitutions come for the most part in the form of a written document and contain the legal ground rules for life in society: rights and principles, values and duties, provisions for the organization of government and, with regard to the operative quality of the document, ascertaining its authority, openness to interpretive change or legislative amendment, shifting between stability and flexibility. From this general picture I have inferred¹ that most constitutional items

¹ This article is based on two earlier publications in which I introduced and elaborated the IKEA theory of legal/constitutional transfer: Frankenberg G. 'Verfassungsgebung in Zeiten des Übergangs' in idem, *Autorität und Integration. Zur Grammatik von Recht und Verfassung* (Suhrkamp Verlag 2003) 115-135; and Frankenberg G. 'Constitutional transfer. The IKEA theory revisited' 8 *International Journal of Constitutional Law* (2010): 563-579.

– shorthand for ideas and institutions, ideals and ideologies, norms and arguments, doctrines and theories – which are part and parcel of reasoned elaboration in doctrine and theory, of comparative analysis and practical constitution-making have been standardized and circulate like marketable goods among the participants of the local, regional, and transnational disciplinary discourse and, in particular, among constitutional elites and their consultants as well as social movements with a constitutional agenda.

What reads like one of the many narratives of globalization, focuses on the fact that the modern constitutional idiom, though always geared toward and entangled in a specific local and historical context, has proliferated world-wide with liberal constitutionalism holding a hegemonic position. The (not all that innocent) narrative may be referred to as the globalization of the modern idiom creating a “global constitution”. It reflects and intends to criticize – the dominance of an intensely AngloEurocentric constitutionalism which, incidentally, has shaped and, despite critical voices, still shapes mainstream comparative constitutional studies.

However, in its flat, one-dimensional version, this narrative has very little to say about how such globalization happens, what happens when globalization happens, and whether it is challenged by glocalization – alternatives to the liberal-western paradigm. It needs to consider “subversive reception”² and “discursive pathways”,³ and requires deciphering the gender, class, race asymmetries it reproduces⁴ and the ideological subtext accompanying globalization like a shadow.

² See below Marín R. R. ‘Legal Transfers of Women and Fetuses: A Trip from German to Portuguese Abortion Constitutionalism’ *Order From Transfer Comparative Constitutional Design and Legal Culture* Ed. Frankenberg G. Cheltenham: Edward Elgar Publishing Ltd, 2013.

³ See below Baxi U. ‘‘Ordering’ Constitutional Transfers: A View from India’. *Order From Transfer Comparative Constitutional Design and Legal Culture* Ed. Frankenberg G. Cheltenham: Edward Elgar Publishing Ltd, 2013.

⁴ See below Markard N. ‘Privat but Equal? Why the right to privacy will not bring full equality for same-sex couples’. *Order From Transfer Comparative Constitutional Design and Legal Culture* Ed. Frankenberg G. Cheltenham: Edward Elgar Publishing Ltd, 2013.

For that reason, the IKEA narrative has always accentuated specific items that defy commodification and globalization and remain entrenched in the (local) context they arise from. To complement and also critique the standard line on globalization, I take at closer look at those items – here referred to, somewhat ironically and definitely without any underlying derogatory normative meaning, as “odd details” – which have proven, at least up to a certain point in time, transfer-resistant and therefore challenge the western-liberalist hegemony. The question of how constitutional items (have) turned into commodities for transnational usage will be contrasted here with an analysis of non-marketable phenomena which might or in fact did subvert the dominant paradigm of constitutionalism. This is to say that odd details may superficially seem to be strange items of interest for constitutional tourism, however, they may also and often do constitute moments of anti-hegemonic rebellion and institute alternative constitutional visions and traditions.

II. A CRITIQUE OF THE UNITARY PROJECT: FROM TRANSPLANT TO TRANSFER

For quite some time mainstream comparatists have pursued an overwhelmingly western, unitary project⁵ by confirming their belief in a cross-culturally coherent body of constitutional law, downplaying differences, proceeding with an eye toward convergence, claiming that there is a significant degree of congruence between social problems and their constitutional solutions, and arguing that the areas of agreement and overlap clearly outweigh significant contextual and functional varieties. This unitary project clearly leaned towards the hegemonic center and supported/sold the AngloEurocentric vision of constitutions

⁵ Recently Horwitz M. ‘Constitutional Transplants’ 10 *Theoretical Inquiries in Law* (2009). <<http://www.bepress.com/cgi/viewcontent.cgi?article9>>. For critical views see Teitel R. ‘Comparative Constitutional Law in the Global Age’ 117 *Harvard Law Review* (2004): 2570 and Frankenberg G. ‘How to Do Projects with Comparative Law – Notes from an Expedition to the Common Core’ *Opening Up European Law* Eds. Bussani M. & U. Mattei Carolina Academic Publishers. 2007.

and their comparative study. Given the academic pedigree of and political support for this theoretical-methodological venture, it does not come as a surprise that comparatists have looked for “common cores,” “unidroit,” universal “legal formants,” etc. and have explicitly or implicitly assumed that the *transplant* of constitutional and legal items has happened, is possible, and does not create significant theoretical or practical problems.⁶

The concept of transplant appears to have been one of the pillars of this unitary project. Only recently comparatists addressed the question of why and how constitutions, though genealogically and in practice more often than not linked to particular nation-states and cultures, have come to share a modern idiom, and they have confronted the unitary vision with insights into legal pluralism and have accentuated difference.⁷

To move away from congruence and common cores and to challenge the widespread notion of transplant, I once introduced and nor still defend the IKEA metaphor, somewhat generously labelled theory. *First*, it is intended focus on transfer and set into relief the development and availability of a supra-national repertoire of constitutional items. This metaphor is also meant to (a) elucidate the politics and projects of constitution-making by deconstructing the naturalist and idealist mist and myth that generally surrounds the practice of how constitutions are constructed, and (b) highlight how “framers” are inspired and influenced by, borrow from and, in turn, modify elements of imported constitutional building-materials.

Second, and in more difficult step, the IKEA theory addresses the concept and difficulties of transfers of law – a process, activity, and problem – for which the discourse on comparative law has generated a variety of terms: “legal transplants,” “reception,” “borrowing,” “adaptation,” “mutation,” “influence,”

⁶ See below Tohidipur T. ‘Introduction: Comparative Constitutional Studies and the Discourse on Legal Transfer’ *Order From Transfer Comparative Constitutional Design and Legal Culture* Ed. Frankenberg G. Cheltenham: Edward Elgar Publishing Ltd, 2013.

⁷ See below Eckert J. ‘Who is afraid of legal transfers?’ and Hendry J. ‘Legal Pluralism and Normative Transfer’. *Order From Transfer Comparative Constitutional Design and Legal Culture* Ed. Frankenberg G. Cheltenham: Edward Elgar Publishing Ltd, 2013.

“evolution,” “translation,” more recently “migration”⁸ etc. At the same time these terms operate as signifiers of different theoretical approaches and projects. Some use transfer or any term considered synonymous in support of their unitary agenda; others qualify or reject any legal import/export in support of their theories of legal pluralism or contextualism. Rather than mapping the discourse in comparative constitutional studies on transfer/transplant/reception etc. I start with a collision of two antagonistic disciplinary projects – legal history versus legal philosophy – and a clash of scientific communities – modern versus postmodern – which originally set off a fundamental (maybe also fundamentally misunderstood) controversy over the (im)possibility of legal transplants. Alan Watson’s study on “Legal Transplants”⁹ ignited Pierre Legrand’s polemical critique; thereafter comparatists have carried on the debate.¹⁰ Considering that there are several approaches to the problem,¹¹ it may still be worthwhile to briefly recapitulate that initial controversy.

After setting up comparative law as an “independent academic discipline” based on the investigation of the relationship between legal systems, and after elaborating the perils and virtues of a comparative approach, Alan Watson introduced “the strangest paradox” of (private) law. From a mainly historical perspective, complemented by civil law jurisprudence, he confronted the notion of law as both an emanation of “the spirit of the people” informed by historical

⁸ From the burgeoning literature see only Choudry S. Ed. *The Migration of Constitutional Ideas* Cambridge: Cambridge University Press. 2006 or Duss V., et al. Eds. *Rechtstransfer in der Geschichte – Jahrbuch junge Rechtsgeschichte 1* München: Martin Meidenbauer. 2006.

⁹ Watson A. *Legal Transplants. An Approach to Comparative Law* Edinburgh: Scottish Academic Press. 1974; Legrand P. ‘The Impossibility of ‘Legal Transplants’’ 4 *Maastricht Journal of European and Comparative Law* 111 (1997); Watson A. ‘Legal Transplants and European Private Law’ 4 (4) *Electronic Journal of Comparative Law* (December 2000) <<http://www.ejcl.org/ejcl/44/44-2.html>>.

¹⁰ E.g. Graziadei M. ‘Comparative Law as the Study of Transplants and Receptions’, *The Oxford Handbook of Comparative Law* Reimann M. & R. Zimmermann Eds. Oxford: Oxford University Press. 2006; Choudry *supra*, note 3; and recently Horwitz, *supra*, note 5.

See below Seckelmann M. ‘Clotted History and Chemical Reactions – On the Possibility of Constitutional Transfer’. *Order From Transfer Comparative Constitutional Design and Legal Culture* Ed. Frankenberg G. Cheltenham: Edward Elgar Publishing Ltd, 2013.

experience and of legal transplants.¹² “Savigny plus” one might be tempted to call this project, as it confronts the historical “Volksgeist” with the synchronic existence of norms. Watson went on to identify numerous examples of transplants in the areas of contract, torts, and property, as he travelled from the Ancient Near East to Greece and Rome and from there to Scotland, England, Holland and other countries. Borrowing plus adaptation, we learn, has been the formula for “the usual way of legal development.”¹³ By way of illustration he compared several provisions from the Laws of Eshnunna and the Babylonian Code of Hammurabi with Exodus concerning the goring of persons or animals by an ox and deduced from the similarities in style and substance that the provisions “probably ... share an ultimate common source.” From rules dealing with matrimonial property that travelled from the Visigoths via Spain to California he inferred that “legal transplants are already to be found in remote antiquity and were probably not uncommon.”¹⁴ He also based his transplant theory on less exotic phenomena and instances such as the selective or sweeping reception of Roman Law, Justinian’s *Corpus Juris Civilis*, its basic rules, systematic structure and scientific elaboration in the legal regimes of several European host countries as well as the (Puritan) treatment – with significant variations – of the Bible as a source of law.

In the closing chapters of his book Watson offered a list of general reflections on legal transplants that he combined with a few cautionary considerations. On the one hand he argued that “the transplanting of individual rules or of a large part of a legal system is extremely common” and “socially easy.” From this statement he inferred that it is, “in fact, the most fertile source of development,” and accounts for the “astounding degree” to which “law is rooted in the past.”¹⁵ On the other hand he mentioned authority in law as an important

¹² Watson, *Legal Transplants*, *supra*, note 9.

¹³ *Ibid.*, 7.

¹⁴ *Ibid.*, 24.

¹⁵ *Ibid.*, 95.

variable intervening in any transplanting process¹⁶ and, in the end, found “the mixture” more fascinating than the very act of borrowing.

Against this fairly sweeping message of Watson’s transplant thesis Pierre Legrand launched an equally sweeping attack. Reformulating Montesquieu’s scepticism concerning the simple transfer of legal institutions, Legrand submitted Watson’s formalism and comparative functionalism to a biting critique, characterized as legal solipsism Watson’s notion of a “nomadic character of rules”¹⁷ and deconstructed the double equation of “law-as-rule” and “rules-as-propositional-statements” by differentiating between the a-contextual meaning emerging from the wording of a rule and the context-dependent meanings ascribed to a legal norm in the processes of application by the interpretive community. Quite persuasively he argued that the latter constitute the ruleness of a rule – or, we might add, the meanings of a right, principle or even preamble – and does not survive (unchanged?) the displacement from one legal regime to another.¹⁸ So the original meaning gets lost in translation, or rather: repetition.¹⁹ Legrand overstated his point somewhat by concluding:

“[W]hat can be displaced from one jurisdiction to another is, literally, a *meaningless* form of words. To claim more is to claim too much. In any *meaningful* sense of the term, ‘legal transplants’, therefore, cannot happen.”²⁰

As a matter of consequence he proposed to move away from *l’énoncé* to *l’énonciation*. This is to say, he demonstrated how repetition is conditioned by a particular epistemological framework, by epistemic conventions and a specific *mentalité*, and how repetition, due to the historical-cultural context and power struggles, always involves the repression²¹ of alternatives.

¹⁶ *Ibid.*, 96 and passim.

¹⁷ Legrand, *supra*, note 9, passim.

¹⁸ *Ibid.*, 117-120.

¹⁹ See Hoffman E. *Lost in Translation*. London: Minerva. 1991.

²⁰ Legrand *supra*, note 9, 120.

²¹ Concerning the connection between repression and repetition Legrand refers to Deleuze G. *Différence et répétition*. Paris: Presses Universitaires de France. 1968, 139.

In his reply to these charges, to Legrand's "Montesquieu minus" position, Watson simplified his critic's point by implicitly restating his own view of law-as-rule:

"Where a written statutory law is the same within two countries, its judicial interpretation may well differ because of tradition and ways of legal thinking."²²

Consequently, he conceded the truth of the trivialized version of the transplant critique that "a transplanted rule is not the same thing as it was in its previous home."²³ Moreover, Watson did not address his critic's proposal to move from bare text to context, from similarity on the surface to difference at the bottom, and to leave off mechanical analogies, synthetic visions, and unitary thinking in comparative legal studies.²⁴ Instead, he claimed he could not find any substance in the transplant-critique.

Whatever Watson and Legrand may have intended with their comparative projects, they certainly did polarize the field of comparative legal studies and succeeded in elucidating that the transfer of law cannot be treated as a factual given but is deeply problematic and calls for theoretical and methodological assistance that has to move beyond the stand-off between textualism/formalism versus contextualism²⁵ Watson tended to receive more support for his transplant thesis in the functionalist camp, by authors defending the unity of law, the convergence of legal regimes, or "the factual approach." By contrast, Legrand's critique was in general supported by anti-formalists and contextualists, who would not deny that quite a few successful institutional transfers have been registered and that "legal transfers are possible, are taking place, have taken place and will

²² Watson, *Legal Transplants and European Private Law*, *supra*, note 8, 2.

²³ *Ibid.* and Watson A. *Law Out of Context*. Athens: University of Georgia Press. 2000. 1.

²⁴ Legrand, *supra*, note 9, 122-124; Frankenberg G. 'Critical Comparisons: Rethinking Comparative Law' 26 *Harvard International Law Journal* 411 (1985): 453.

²⁵ For references to the different critics and supporters see Frankenberg 'Constitutional transfer', *supra*, note 1.

take place,”²⁶ but would avoid the naturalist fallacy.²⁷ Some authors have recently suggested other and more apt terms and have praised “migration” as “a helpfully ecumenical concept in the context of the inter-state movement of constitutional ideas”, equally amenable to “all movements across systems, overt or covert, episodic or incremental, planned or evolved, initiated by giver or receiver, accepted or rejected, adopted or adapted, concerned with substantive doctrine or with institutional design or some more abstract or intangible constitutional sensibility or ethos.”²⁸

Transfer²⁹ appears to qualify as an even more ecumenical concept, unless one wants to analyze how a legal regime is “grafted over” by legal imports.³⁰ Both migration and transfer refer to movements, capture a wider variety of uses than, say, transplant or borrowing, and qualify such movements as problematic – because of cultural diversity, imperialist structures, hegemonic influence, etc.³¹ – rather than socially easy, as artificial rather than natural or organic. As distinct from migration, transfer also is more open to the varieties of conscious and unconscious import-exports over spatial, temporal, social, and cultural distances and differences. Moreover, the concept captures the compactness of the transferred information³², its commodification and, more importantly, relates with ease to the constructive dimension of constitution making, its design and

²⁶ Nelken D. ‘Comparatists and Transferability’ *Comparative Legal Studies: Traditions and Transitions* Legrand P. & M. Roderick Eds. Cambridge: Cambridge University Press 2003. 437, 442.

²⁷ See Örüçü E. & David Nelken Eds. *Comparative Law. A Handbook* Oxford: Hart Publishing. 2007.

²⁸ Walker N. “The migration of constitutional ideas and the migration of *the* institutional idea: the case of the EU” Choudry, *supra*, note 8, 316, 320-321.

²⁹ See also Stichweh R. ‘Transfer in Sozialsystemen: Theoretische Überlegungen’ Duss et al., *supra*, note 8.

³⁰ See below Gargarella R. ‘Constitutional Grafts and Social Rights in Latin America’. *Order From Transfer Comparative Constitutional Design and Legal Culture* Ed. Frankenberg G. Cheltenham: Edward Elgar Publishing Ltd, 2013.

³¹ See below the contributions of H. Kwasi Prembeh, Upendra Baxi, Stefan Kadelbach, Philipp Dann, Helena Alviar García *Order From Transfer Comparative Constitutional Design and Legal Culture* Ed. Frankenberg G. Cheltenham: Edward Elgar Publishing Ltd, 2013.

³² Stichweh, *supra*, note 29, 3.

bricolage as well as the specific political, socio-economic and economic situation (occupation; colonial regime; postcolony; divided society, etc.).

Hence, assuming that legal transfer is a workable – by no means politically agnostic or neutral – concept, I address in the following not so much its (im)possibility but the mechanisms and conditions that facilitate or preclude import/export. The overall focus will be on pathways – not “one-way streets”³³ – sites and modalities of transfer, and on results, risks and side-effects as well as on the inclusion in or exclusion from the repertoire – the IKEA market center – that can be tapped globally.

III. INITIAL CIRCUMSTANCES OF TRANSFER

In “The World, the Text and the Critic” Edward Said describes the travels of theory and ideas:

“Like people and schools of criticism, ideas and theories travel – from person to person, from situation to situation, from one period to another. Cultural and intellectual life are usually nourished and often sustained by this circulation of ideas, and whether it takes the form acknowledged or unconscious influence, creative borrowing, or wholesale appropriation, the movement of ideas and theories from one place to another is both a fact of life and a usefully enabling condition of intellectual activity.”³⁴

Said distinguishes four stages in the travel of theory that may help to elucidate the pathways and problems of legal/constitutional transfer (provided the travel metaphor is itself transferred to the realm of constitutional processes, practices, and ideas, which means to the real of politics, power, and ideology): “First, there is a point of origin, or what seems like one, a set of initial

³³ As Felix Hanschmann shows in his study ‘German Citizenship and its Colonial Heritage’ *Order From Transfer Comparative Constitutional Design and Legal Culture* Ed. Frankenberg G. Cheltenham: Edward Elgar Publishing Ltd, 2013.

³⁴ Said E. *The World, the Text, and the Critic* London: Vintage 1983. 226-247.

circumstances in which the idea came to birth or entered discourse.”³⁵ Edward Said’s narrative prudently weakens any originalist assumption by considering that the point of origin may only “seem like one” and qualifying and de-privileging the origin as a “set of initial circumstances.”

In studies of constitutional transfers any “point of origin” has to be treated with even more scepticism and deconstructed, as it may very likely be fictitious or only the thereafter of something that had happened before.³⁶ Moreover, it is only for analytical reasons that comparatists have to look for a moment or host environment where transfer could plausibly have begun. So there is no harm in learning that the “government of laws and not of men,” often ascribed to the 1780 Constitution of Massachusetts and credited to John Adams, one of its framers, might actually date from Aristotle’s political philosophy. Its second coming and not Aristotle triggered its export/import career. And it makes little difference whether the globally illustrious Immanuel Kant, the German celebrity Adam Müller or the fairly obscure and almost forgotten criminal lawyer Harscher von Almendingen fathered the concept “Rechtsstaat”,³⁷ because the study of legal/constitutional transfer is not, one would hope, about ancestor worship and originalism³⁸ but critical comparisons and contexts.

Hence, the phases of transfer outlined here are not to be taken as a strict sequence of steps but as one of the many possible pathways for the export and import of laws. As a matter of fact, the sequence moving from de-contextualization via globalization to re-contextualization, may have to be

³⁵ *Ibid.* 226-227.

³⁶ Unless we return to the constitutional novelties that appeared at the turn of the 18th century; or are able to identify a more recent constitutional innovation, such as the human right to asylum of the 1949 *German Basic Law*.

³⁷ For a deconstruction of originalist assumptions concerning the Rechtsstaat see Frankenberg G. *Staatstechnik. Perspektiven auf Rechtsstaat und Ausnahmezustand* Frankfurt am Mein: Suhrkamp Verlag. 2010. 75.

³⁸ And, incidentally, the conservative proponents of originalism in United Statesean constitutional interpretation have unwillingly done their best to deconstruct the very notion of a “fixed and knowable meaning” of texts and intents. See Carter L. E. and Tulloch L. *Originalism and Ancestor Worship: True or False?* New York: Oxford University Press. 2008.

reversed, if a set of initial circumstances cannot be pinned down – not even analytically – or calls for extensive (comparative) research or a critique of misleading originalist assumptions. Thus, in his informative study of how the imperial presidency proliferated throughout Africa H. Kwasi Prembeh traced its “puzzling persistence” – the results of transfer processes – to authoritarian policies of national integration and development, thereby refuting a widespread “theory” explaining authoritarianism as rooted in the cultural-tribal heritage.³⁹

The 1831 Belgian Constitution, widely regarded as one of the leading constitutions of the 19th century in Europe, on closer scrutiny reads like an almost ironic comment on originalism with hardly more than 10 percent of document labelled “Belgian”.

IV. TRANSFER AS DE-CONTEXTUALIZATION

Constitutional information, first, is isolated from the circumstances of its production and processed for transfer. Unlike travelling theory –

“[T]here is a distance transversed, a passage through the pressure of various contexts as the idea moves from an earlier point to another time and place where it will come into new prominence.”⁴⁰ –

constitutional building materials, before they may move to another place and time, transgress cultural borders and the confines of epistemic communities, undergo the complex process of de-contextualization. There is no methodology available to adequately analyze what happens at this open-ended and heterogeneous moment in the transfer of law, when and where national and supranational pathways intersect. So, one is left to an attempt of approximation. Metaphorically speaking, the items are shock-frozen and packaged for the transgressing of time,

³⁹ Kwasi Prembeh H. ‘Presidential Power in Comparative Perspective: The Puzzling Persistence of Imperial Presidents of Post-Authoritarian Africa’ (September 2007) <http://works.bepress.com/kwasi_prembeh/2> accessed 15 March 2012. See also below Kwasi Prembeh H. ‘Constitutional Autochthony and the Invention and Survival of “Absolute Presidentialism” in Postcolonial Africa’ *Order From Transfer Comparative Constitutional Design and Legal Culture* Ed. Frankenberg G. Cheltenham: Edward Elgar Publishing Ltd, 2013.

⁴⁰ Said, *supra*, note 34, 227.

space, and context. On a more theoretical note, one might add that the transformation of legal and constitutional building materials into marketable commodities presupposes as necessary conditions three operations: Only after being reified, formalized, and idealized they qualify for entry in the IKEA showroom where they are on display as universally applicable commodities.

De-contextualization therefore amounts to much more than a mere taking-out of a given context and spatial displacement (or export):

Reification transforms “live” and contested ideas, norms or institutions into objects by stripping them of their historical background and socio-cultural environment. Instead of being phenomena of a specific narrative and cultural setting, on their surface they turn into commodities that come as a package⁴¹ of information.

Formalization reduces norms to bare texts, which is to say to propositional statements bereft of interpretive debates and epistemic conventions that give them meaning(s). Likewise, institutions are reduced to the propositional content of a document describing one or the other organisational arrangement.

Finally, *idealization* transforms the appearance of norms and makes constitutional items look better than they actually look: Norms, doctrines and arguments are taken at their face value and presented as meaning (more or less) what they ought to mean. Likewise, institutions are presented as functioning the way they are generally expected to function. Idealization not only distances the idealized object from real existence but turns it into ideology as far as it camouflages what is the case. In the end, only the official story gets transferred.

To illustrate de-contextualization the “We the people”-formula makes for an instructive example. While there have been myriads of “we-s” and peoples throughout history and all over the world, only the unitedstatesean formula was transformed into a package of information and travelled long distances, in fact acquired a frequent flyer status, disconnected from the original, imaginary “We”-

⁴¹ See Stichweh, *supra*, note 29, 3.

plurality in the constitutions of the several New England states and their union. De-contextualization meant that it was severed from what was “behind the Federal Constitution” – namely its embeddedness in the founding myth of the former New England colonies, the framers’ “efforts to constrain the people” and to contain what Edmund Randolph, one of the framers, feared would be “the fury of democracy”.⁴² Moreover, removed from its production process and stripped of its contextual connotations, “We the people” has since then become a must constitutional elites almost invariably fall back on, very much like proposing a self-congratulatory toast, at the beginning of the document they are about to write and then submit to parliamentary or popular approval.

Likewise, British-style rule of law and the German *Rechtsstaat* as dominant samples of law-rule have travelled a great deal but rarely as what they are: ideologically charged and “contested concepts”.⁴³ Instead they were and still are routinely adopted and applied as abstractions – abstracted from historical struggles that informed their development and from their political-legal background – provided in England by the amalgam of tradition, conventions, freedom bills and political compromises or, respectively and much later in Germany, by the mix of statism, competing claims to sovereignty and the rather moderate revolutionary agenda of Germany’s the 19th century bourgeoisie.

More recently, the concept has also been decoupled from theoretical and doctrinal controversies, from implementation problems and deficits before being launched for transfer as a commodity packaged under the label ROL, condensed to “five essential elements” for usage in countries of the periphery under close monitoring by the International Monetary Fund, the World Bank and other non-law-rule organisations:

⁴² See Fritz C. G. *American Sovereigns: The People and America’s Constitutional Tradition* Oxford UK: Cambridge University Press. 2008.

⁴³ Gallie W. B. ‘Essentially Contested Concepts’ 56 *Proceedings of the Aristotelian Society* 169 (1955-6).

“Long-term, sustainable economic and social development requires democratic governance rooted in the rule of law. The Rule of Law (ROL) Division provides leadership on rule of law issues to USAID field missions and bureaus...” fostering “1. Order and security ... 2. Legitimacy ... 3. Checks and balances ... 4. Fairness and 5. Effective application.”⁴⁴

Similarly, judicial review established in a given country and executed by, say, the US *Supreme Court*, German *Federal Constitutional Court* or the French *Conseil constitutionnel*, usually sets out on its journey to the global reservoir as a polished, ideal-typical court (and practice), and not as a more or less successful and influential but also embattled institution.

V. TRANSFER AS INCLUSION IN THE GLOBAL CONSTITUTION

An impression generally sustained by comparatists suggests that constitutions (and constitutionalism as the accompanying idea and ideology) have crossed geographical borders and language barriers, and have transgressed the boundaries of epistemic communities and political constellations. As a matter of consequence, constitution-makers everywhere appear to have adopted or at least have taken notice of the modern idiom: *Prima facie* they seem to share the same vocabulary, rules of grammar, style and design. And usually, however not always, they opt from a limited variety of institutional paths, catalogues of rights and values, and follow similar basic designs. Globalization of the modern idiom, so one is tempted to infer, has streamlined the practices and results of the framing, amending, and interpreting of constitutions. Albert Blaustein’s checklist of the essential elements of “the modern constitution”⁴⁵ may be read as a fairly accurate, nominalist, albeit superficial, preliminary inventory of the “global constitution” at

⁴⁴ USAID, *Guide to Rule of Law Country Analysis: The Rule of Law Strategic Framework* (updated January 2010).

⁴⁵ Blaustein A. P. *Framing the Modern Constitution: A Checklist* (Rothman & Co 1994).

his time. It inspired rather formalist and naive views regarding the cross-border influence and impact of norms and legal regimes.⁴⁶

The global or globalized constitution is neither introduced here by analogy with a national constitution writ large or an “emerging universal” (constitutional) system,⁴⁷ nor do I diagnose the existence or advocate the desirability of a novel type of trans-, inter- or supranational regime resulting from an adaptation of national constitutions to global requirements.⁴⁸ Instead, I simply claim that the selection of de-contextualized items and their inclusion in the global repertoire can be analytically distinguished as a *third* phase, step or moment in the transfer process. One might object, though, that the globalizing of the modern idiom or some of its parts actually is not a discrete phase or step since it only concludes de-contextualization by integrating marketable items in the IKEA center. However, it can be distinguished analytically, as Helena Alviar García demonstrates with regard to the social function of property.⁴⁹

Depending on the theoretical register, the global constitution might be referred to as the global reservoir or archive, the collective constitutional consciousness or repertoire, or, for that matter, supermarket. Whatever the designation, the market etc. results from a myriad of transfers. Standardized items are registered, stored, exhibited and available for purchase to constitution-makers around the world. At this IKEA market for constitutional building materials

⁴⁶ Hero P. L. ‘The Influence of the United States Constitution’s Bill of Rights upon the Constitutions of the Countries of the World’ 3 *Connecticut Journal of International Law* 31 (1987-88) submitted an exercise in bookkeeping rather than analysis.

⁴⁷ See Allott P. P. ‘The Emerging Universal Legal System’ *New Perspectives on the Divide Between National and International Law* Nijman J. & A. Nollkaemper Eds. Oxford: Oxford University Press. 2007. 63.

⁴⁸ Anne Peters describes the various processes of adaptation in ‘The Globalization of State Constitutions’ Nijman & Nollkaemper, *supra*, note 38, 251. I will return to and contrast her globalization scenario later with my “odd details” analysis. At this point it may suffice to say that globalization is likely to increase both the convergence and divergence or difference of national constitutional regimes. See Muir Watts H. ‘Globalization and Comparative Law’ Reimann and R. Zimmermann, *supra*, note 5, 579, 586-588; Friedman J. ‘Being in the World: Globalisation and Localisation’ 7 (2) *Theory Culture & Society* 311(1990).

⁴⁹ See below Alviar García H. ‘Leon Duguit’s Influence in Colombia: The Lost Opportunity of a Potentially Progressive Reform’ *Order From Transfer Comparative Constitutional Design and Legal Culture* Ed. Frankenberg G. Cheltenham: Edward Elgar Publishing Ltd, 2013.

whoever is about to frame, amend or revise a constitution may – and generally does – tap the vocabulary,⁵⁰ grammar, style, and design characterizing the modern idiom. The buyer may shop for a complete political regime, such as a constitutional monarchy or a parliamentary democracy, or items more limited in scope, such as a rights catalogue, a two-chamber-system, an institutional arrangement for constitutional review or a presidential system, or only a single item, such as the political-question doctrine or the right to equal treatment. And shoppers have the choice between finished products, *prêt à porter*, disassembled products to be put and screwed together at home or inspirational ideas requiring a high degree of constructive elaboration.

Once on the shelves of the IKEA market, globalized constitutional items generally do not refer to their (original) production site, like sneakers not carrying a notice “produced by children in the sweatshops of Mumbai”, a constitution would not be labelled “ideological product of the landowning elite”. Rights catalogues, models of representative democracy, systems of judicial review, values, etc. on store in the IKEA showroom sit on the shelves as bare descriptions of institutions or bare texts of norms gleaned from constitutional documents. Moreover, these items neither come with background information about the contextual prerequisites that make institutions operate smoothly in a specific political constellation nor are norms accompanied by elaborate interpretation manuals (for legal reasoning and balancing) provided by the (original) epistemic community.

Inclusion in and exclusion from the global reservoir depend on a virtual threshold test: Constitutional building materials, once they have passed through the three-pronged process of de-contextualization, turn into commodities: They attain the appearance of universal or at least regional applicability and therefore are granted by the open community of constitution drafters, advisors, engineers and scholars the quality seal reserved for the modern idiom and its parts.

⁵⁰ Comparable to the globalized *lingua franca* of human rights.

Constitutional items that have passed or may pass this test abound: the constitution as written text and single document, the archetypes and the basic architecture of constitutions with their typical ingredients⁵¹ – preambles, rights catalogues, organizational provisions, values and duties, meta-rules and conflict rules, etc.⁵²

VI. DEFYING TRANSFER: ODD DETAILS

There is a reverse or dark side to the narrative of transfer and globalization. And it may be – as a matter of fact: I assume it is – more interesting, albeit, more difficult to recount. It is the story of those ideas, norms, institutions, doctrines, and arguments widely recognized as not being amenable to reification, formalization, and idealization which therefore flunk the threshold test. Constitutional items that appear to be too context-specific, particular or parochial are excluded from the global reservoir. Bereft of universal attire, they do not rise above local prominence and remain, maybe quite happily, at the margin of the transnational discourse of constitutionalism.

They are irrelevant? Wrong. Obscure, at times bizarre, always distant from or even in opposition to the modern idiom – “odd details”. I argue they deserve special attention and a preferential analytical treatment because they are likely to encapsulate local traditions and experiences, social struggles, anxieties and visions. More than the elements of the modern idiom they bring into view the normative orientations and expectations of constitutional elites or the people. Odd details run against the orthodoxy of liberalist constitutionalism, and some qualify as subversive elements. They articulate the indomitable presence of the local,⁵³

⁵¹ See Albert Blaustein’s checklist, *supra*, note 36.

⁵² See Frankenberg G. ‘Comparing constitutions: Ideas, ideals, and ideology, toward a layered narrative’ 4 *International Journal of Constitutional Law* 439 (2006): 459.

⁵³ The indomitable presence of the local has also shaped the “deviant legislation” recently introduced into the German Basic Law (Art. 72 III) to accommodate the political interests of the states by shifting legislative competences from the federal to the state level. Consequently, the states’ legislatures may decide to deviate from federal statutes regulating certain enumerated matters such as hunting or the protection of nature. The result is a confusing mix of competencies

somehow disconnected from the world at large, both from its brighter side – the prospect of cosmopolitanism – and its darker side – the atrocities of imperialism and colonialism as well as their supportive comparative studies.

Oddity, however, is neither easy to identify nor to describe. Moreover, it is a treacherous label. Other than the fact that an item has never been exported and repeated elsewhere and the appearance of context-specificity there are no reliable criteria to distinguish global(ized) items from constitutional information resisting the push and pull of western-liberal constitutionalism. Still, one would consider the 1992 Saudi Basic Law's 60 years of gestation a rather peculiar duration of constitution-making. And there are innumerable other constitutional items that resist commodification: The 1987 Haiti Constitution expressly forbids with (historical) reason "the cult of the personality" and that "effigies and names of living personages may not appear on currencies, stamps" etc. (Art. 7). The Irish president may not leave the country "save with the consent of the Government" (Art. 12, 1937 Constitution). The 1868 Luxemburg Constitution orders that civil marriage "always must precede the nuptial benediction" (Art. 21). Idiots are excluded from succession to the throne by the 1875 Constitution (Art. 35). The 1988 Constitution of Brazil illustrates resistance to the dominant liberal paradigm with its extremely elaborate design and sense of detail, such as the provision that workers be "paid weekly preferably on Sundays" (Art. 7 XV).

Also the unitedstatesean right to bear arms laid down in the Second Amendment counts as an odd detail. Although it could be copied by other constitutions, it is a highly context-dependent guarantee, derived from the Anglo-

which does not follow the logic of rational-efficient regulation but the repeated (and ultimately futile) re-allocation of powers within the federalist system to curb centralist tendencies. Too context-dependent, one would think, to be transferable. Yet, the new Iraqi Constitution displays a provision that, on its surface, resembles the Basic Law's Art. 72 III (but hardly being inspired by it) in that it grants special powers to the regions. However, the equally odd Iraqi Constitution's Art. 112 amounts to more: The right of the regions to nullify federal laws – except in the case of exclusive federal powers – is complemented by a new provision making regional law trump federal law in the case of conflict.

American tradition⁵⁴ of a common law right to self-defense dating back to King Henry II's *Assize of Arms* in the 12th century and the right to resist tyranny informed by the colonial experience of the New England States. Arguably, the Second Amendment was proposed by the Federalists, notably James Madison, to appease the Anti-Federalists' and a widespread popular fear and distrust of a central government by allowing for armed citizens and a "well regulated militia."⁵⁵ Despite its English common law pedigree, the right to bear arms is historically informed by the controversies during the founding era concerning armed forces of the federal government and the colonists' distrust of oppression and a standing army, and their preference of a militia. And it is also intimately linked to the specifically American "regeneration through violence"⁵⁶ and the national myth it created, even today powerful enough to prevent gun control despite a scandalously high death toll and recurrent mass killing by berserk gunmen.

Aside from its dark history and the US psychopathology of arms bearing, and the peculiar American way to balance military and popular power, the power of the states and the nation⁵⁷ the intensely contested⁵⁸ Second amendment qualifies also structurally, by the combination of a justificatory clause with an operative clause,⁵⁹ as an odd detail (notwithstanding its modified re-appearance in the 1853 Argentine Constitution as an obligation to bear arms).⁶⁰

⁵⁴ Dating back to the English Bill of Rights of 1689. See Williams D. C. *The Mythic Meanings of the Second Amendment: Taming Political Violence in a Constitutional Republic* New haven CT and London: Yale University Press. 2003.

⁵⁵ See Madison J. *The Federalist Papers*, No. 46, and Wills G. *A Necessary Evil: A History of American Distrust of Government* New York: Simon & Schuster. 1999. 258.

⁵⁶ Slotkin R. *Regeneration Through Violence: The Myth of the American Frontier* Hanover NH: Wesleyan University Press. 1973.

⁵⁷ E.g. Wills, *supra*, note 45.

⁵⁸ From *United States v Cruikshank* 92 US 542 (1875) until *District of Columbia v Heller* 128 S Ct 2783 (2008) the Supreme Court and commentators have agonized over the meaning(s) of the Second Amendment. See also Tushnet M. *Out of Range: Why the Constitution Can't End the Battle Over Guns* New York: Oxford University Press. 2007.

⁵⁹ Volokh E. 'The Commonplace Second Amendment' (1998) 73 *New York University Law Review* 793.

⁶⁰ Referring not to militia but compulsory military service in defense "of the fatherland and this Constitution" (chapter I section 21).

Constitutional items that resist de-contextualization can be found within and without the range of western constitutionalism. The 1992 Vietnamese Constitution portrays a unique and complex economic structure – “a multi-component economy functioning in accordance with market-mechanisms under the management of the State and following a socialist tradition” (Art. 15). State-run, cooperative, family, private, and foreign enterprises are alloyed on the constitutional level by a mixed cluster of heterogeneous values, promotional goals, and guarantees.⁶¹ This peculiar constitutional amalgam hinges upon the leading cadres’ decision in the early 1990s to open up the planned economy for private initiative and foreign investors while preserving both its socialist core and pre-socialist family tradition.⁶² It calls for a careful comparative analysis, in particular its historical layers shaped by colonial occupation, imperialist wars, liberation and reconstruction.

Non-marketable items may change over time, though, and turn into constitutional building materials that find a market at least in a related geographical, political or ideological region, if only after a certain delay. What appears to be context-specific and peculiar to one country may cross national-cultural boundaries and make its way into other constitutional documents: The constitutional abolition of untouchability in India (1949 Constitution, Art. 17) reappeared in the neighboring constitutions of Bangladesh, Pakistan and Sri Lanka in the guise of a prohibition to discriminate against persons on the grounds of caste. Likewise, the obligation of adult children to provide for their parents which from the perspective of liberal constitutionalism might seem unusual if not odd, travelled from post-soviet host countries (1991 Uzbekistan, 1993 Russia, 1995 Kazakhstan) to post-colonial constitutions (2005 Swaziland). The right to

⁶¹ Connecting the dominant State sector (Art. 19) with the collective sector (Art. 20), the family economy (Art. 21, 64, 66, 67), the private sector (Art. 23, 57,58), and the sector open to foreign investment (Art. 25).

⁶² For a detailed account of the legal and economic reform in Vietnam see Blecher M. and G. Frankenberg, ‘Doppelstaat und plurales Recht – Anmerkungen zur Rechts- und Wirtschaftsreform in Vietnam’ 2 *Zeitschrift für Zivilprozeß International* 379 (1997).

get married and have a family (1945 Indonesia; 1998 Albania, 2005 Armenia, 2010 Kenya) may embark upon a similar regional career despite resistance from or rather non-compliance of the part of Islamic countries. All these examples – one may want to add the references to historical materialism in socialist constitutions – illustrate the difficulty to differentiate between odd details, regionally marketable items and phenomena that point towards hybrid archetypes complementing the modern idiom.

VII. RE-CONTEXTUALIZATION: THE RISKS AND SIDE-EFFECTS OF *BRICOLAGE*

In a *fourth* constructive step, the purchased/imported globalised items have to be *re-contextualised* in and *adapted* to a new or “host” environment. There, whatever is transferred meets with “conditions of acceptance or, as an inevitable part of acceptance, resistance”.⁶³ These conditions determine the “grand hazard”⁶⁴ not only of constitutional but any legal transfer: Rejection or the complex and complicated, smooth or rough, rapid or lengthy, re-contextualisation of the transferred “objects” within the new cultural setting.

Re-contextualization presupposes, first, the unfreezing and unpacking of the transferred item and, second, involves a series of introductory, adaptive, modifying moves in the course of which the imported information is subject to re-interpretation, re-designing, and *bricolage*.⁶⁵ At any rate, a simple assembling of the imported parts/information generally does not provide the desired results but involves a great deal of improvisation. Again in the line of Said’s travelling

⁶³ Said *supra*, note 25, 227.

⁶⁴ Montesquieu C.-L. *De L’Esprit des Lois* Geneva. 1748. Book 1, ch 3. See, also, Kahn-Freund O. ‘On the Uses and Misuses of Comparative Law’ 37 *Modern Law Review* 6 (1974), and Stein E. ‘Post-Communist Constitution-Making: Confessions of a Comparatist (Part I)’ Jean Monnet Chair Papers – The European Policy Unit at the European University Institute 25 (1992).

⁶⁵ Which may be translated as “tinkering” to convey the makeshift, do-it-yourself character. For a theoretically elaborated concept of *bricolage* as a method of “wild thinking” see Lévi-Strauss C. *The Savage Mind*, Chicago: University of Chicago Press. 1966. 16-32.

theory, “the now full (or partly) accommodated (or incorporated) idea”⁶⁶ – or constitutional item – have to be inserted in the new constitutional framework by the actors of re-contextualization and then put to use under the new circumstances by the new epistemic community – courts, legal academics. Thus the transferred item undergoes a process of transformation “by its new uses, its new position in a new time and place.”⁶⁷ Beginning with the making or amending of constitutions and then continuing with their application in constitutional adjudication and interpretation, the imported building materials have to be fitted into the new normative framework, political constellations, and cultural setting.

As constitution-makers and their consultants, when they go about the re-assembling of the imported items, have to operate without the original master-plan or meaning – the constructors’ intentions or contextual expectations – they may, at best, rely on fairly unreliable and abstract instruction manuals provided by global constitutionalism. This is why transfers come with considerable risks experienced IKEA shoppers are well aware of, ranging from the “immuno-reactions” of the host culture to a non-adaptable constitutional import to the less dramatic risk of a bad fit and the risk of “missing links”.

Immuno-reactions are rare but not unheard of. To insert imported materials into a new normative framework and political-cultural context, and put them to use may fail because the abstract, commodified item meets with political resistance or simply does not make sense in the new environment because there is no methodology available to decode its message nor an ideology to re-invent it. Yet a different outcome of the re-contextualization may be that the operative logic of institutions or procedures remains misunderstood and they just do not even remotely work as was expected.

⁶⁶ Ibid.

⁶⁷ Ibid.. See below the contributions of Helena Alviar García, Roberto Gargarella, Felix Hanschmann, H. Kwasi Prempeh, and Ruth Rubio Marín *Order From Transfer Comparative Constitutional Design and Legal Culture* Ed. Frankenberg G. Cheltenham: Edward Elgar Publishing Ltd, 2013.

A case of political resistance happened in 1920 in conjunction with plans to transfer the Swiss federal system to Czechoslovakia.⁶⁸ After the “Velvet Revolution,” or rather the dismantling of the Soviet Union, the transfer of German-style judicial review to Russia failed because its operative logic was misunderstood.

More commonly, transfer results in bad fit because the package contains information that can neither be used nor adapted or lacks important information. Re-contextualization may furthermore show that institutions have to be redesigned so as to accommodate them to existing power constellations or cultural dispositions. Thus, the model of the German Federal Constitutional Court which could thrive and be reined up in a consolidated democracy, once exported, albeit in a modified version, to post-socialist Hungary attracted a lot of criticism and opposition as a hypertrophic center of power. Likewise doctrinal items, such as the proportionality principle or the political question doctrine, may need a different twist and norms a different interpretation in a new normative context, or they may have to be revamped altogether. Correcting the bad fit or finding the missing links may require a return to the IKEA center and the consultations of constitutionalists, unless the parts can be fabricated on-site. First, the results depend on where the information is contextualized as Philipp Dann and Stefan Kadelbach show for post-conflict constitutions.⁶⁹

Re-contextualisation is likely to produce a variety of results. On the one hand, the results depend on which information is selected and purchased, how it is processed, and what risks it entails. On the other hand, transferred items are shaped by both the ignorance and the expertise of those entrusted with the job of re-contextualization, the time-frame for their work, political pressures, etc. The end-product may turn out to be a respectful or ironic imitation or *pastiche*, a

⁶⁸ Lachmund J. ‘Paris-Prag. Geschichte eines Verfassungstransfers’ Duss et al., *supra* note 3, 322, 325-327.

⁶⁹ See below Dann P. ‘International Influence on Post-Conflict Constitution-Making’ and Kadelbach S. ‘Introduction: Constitution-Making in Occupied Countries’.

creative hybrid or “naïve novelty”,⁷⁰ at best, a modified replica, rather than a genuine copy of what initially was bought as a standardised model.

Despite the semblance of similarity to the propositional statements in constitutions and of designs and structures, one has to bear in mind that transferred items, once contextualised, are invested by their local interpreters with specific meanings according to the prevalent epistemological assumptions (*Vorverständnis*) and conventions. Moreover they are met by their local interests with specific expectations according to local political circumstances and projects. The open-ended phase of re-contextualization is vastly simplified by the transplant thesis and bears very little resemblance to the transplanting of an organ, let alone a tomato plant.⁷¹ For constitution-makers and their consultants, when going about the re-assembling and re-inventing of the imported items, have to operate without knowing the original master plan or meaning and may, at best, rely on fairly unreliable and abstract instruction manuals provided by global constitutionalism. Moreover, transfers, if not rejected outright, establish a semiotic relationship between the sender and the recipient, which is usually kept in the dark. Here are some illustrations of the risks and side-effects of transfer:

To start with the preamble of the U.S. Constitution credits its status as an icon of constitutional prose which succinctly captures the spirit of modern constitutionalism in one sentence, and therefore has the charm of tradition and concision.⁷² Despite its religious connotations and implicit references to the historical context, the preamble is widely reputed as being, at least on the surface,

⁷⁰ The term was introduced by Eric Stein to describe the result of “ignorance of foreign patterns and a romantic, parochial conception of the specificity of local conditions” that may “prevent functional transfers,” see Stein E. *supra* note 53, 25 and Stein E. ‘Uses, Misuses – and Nonuses of Comparative Law’ 72 *Northwestern Law Review* 198 (1977).

⁷¹ The quite unfortunate but very telling example of the tomato plant is taken from Watson’s defense of his transplant thesis.

⁷² “We the People of the United States, in order to form a more perfect union, establish justice, ensure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.”

a thoroughly secular and universally applicable text,⁷³ even if “just beneath this godless surface flows the force of a pure revelation.”⁷⁴ Despite its elitist origin, the invocation of the (absent) collective has contributed to its high democratic esteem, to its aura as the ultimate source of authority. In the course of constitutional history, “We, the People” has become one of the most prominent items in the global reservoir of constitutionalism, copied and pasted⁷⁵ by numerous constitution-makers from Albania to Costa Rica and from Liberia to East Timor. As is illustrated by the travelling “We the people”, the formula re-appears as a modified replica (“We, the representatives of the people of the Argentine Nation” and “We, the Swiss People and Cantons”) or a hybrid⁷⁶ imagination of a democratic polity yet to be established (“We the people of Afghanistan” in the post-Taliban constitution). In the framework of a constitutional monarchy (Cambodia 1993) the “We the people” arguably qualifies as a naïve novelty conjoining the popular we-rule and monarchic I-rule.

Needless to say, that from one strange context to another “We the People” will adopt a different meaning. Despite the repetition of the original propositional formula, constitution-makers invoke and constitution-readers connote a different historical and political “We” depending on the national-cultural environment. The simple “We the People”, one may conclude, testifies against the possibility of constitutional “transplants” but illustrates constitutional transfers and the art of *bricolage* and the attribution of meanings in different constitutional settings.

As distinct from preambles, which are generally, albeit unduly, dismissed as merely decorative and marginal stuff, rights catalogues, in conjunction with

⁷³ See Arendt H. *On Revolution* New York: Viking Press. 1963; Rödel U. & H. Dubiel, G. Frankenberg, *Die demokratische Frage* Frankfurt am Main: Suhrkamp Verlag. 1989; Meltzer M. *Secular Revelations. The Constitutions of the United States and Classic American Literature* Cambridge: Harvard University Press. 2005.

⁷⁴ Meltzer *supra* note 61, 2.

⁷⁵ E.g. Skach C. ‘We, the Peoples? Constitutionalizing the European Union’ 43 *Journal of Common Market Studies* 149 (2005).

⁷⁶ For transfer leading to a hybrid see Gal M. S. ‘The ‘Cut and Paste’ of Article 82 of the EC Treaty in Israel: Conditions for a Successful Transplant’ 9 *European Journal of Law Reform* 467 (2007).

democracy and the rule of law, hold a secure status as central chapters in the book of liberal constitutionalism.⁷⁷ While constitutions can do without a preamble,⁷⁸ the modern constitutional idiom and ideology require that they come with an elaborated bill of rights as well as rule of law and democracy principles. The French *Déclaration* set the tone with its verdict that a society neither guaranteeing rights nor establishing the separation of powers does not have a constitution;⁷⁹ the Constitution of Haiti followed in 1801 and sealed the first successful slave revolt in the French colony of Saint-Domingue, as it was then called.⁸⁰ Thereafter, numerous other constitutional instruments, political struggles, and philosophical theories have proliferated the idea of rights and have generated, at least inspired an indomitable rights-making activity, partly innovative, mostly based on transfer. Many of the problems of life in society, such as domination, discrimination, political participation, poverty, access to education, etc., for which rights are meant to provide the answer, even if they may also be part of the problem,⁸¹ tend to transcend political constellations, economic conditions and socio-cultural settings. And the drafters of rights catalogues, so as not to reinvent the wheel, are tempted to glean the text of norms and the formula of doctrines as well as the design of institutions relating to rights from the global constitution.⁸² Again, it

⁷⁷ Blaustein, *supra*, note 36.

⁷⁸ Such as Austria, Belgium, Denmark, Finland or Botswana. Constitutional monarchies either operate without a preambling “We,” or the “We” refers to the monarch as still symbolically embodying the people.

⁷⁹ “*Toute Société dans laquelle la garantie des Droits n’est pas assurée, ni la separation des Pouvoirs déterminée, n’a point de Constitution.*” Art. 16 *Déclaration des droits de l’homme et du citoyen*, 26 August 1789.

⁸⁰ James C.L.R. *The Black Jacobins Toussaint L’Ouverture and the San Domingo revolution*. 2nd ed Vintage, New York: Random House. 1989.

⁸¹ Kennedy Da. *The Dark Side of Virtue: Reassessing International Humanitarianism*. Princeton University Press. 2005.

⁸² The wholesale adoption of a rights catalogue is only one way of tapping the global reservoir. In a less conspicuous manner, national constitutions may declare the Universal Declaration of Human Rights and the International Covenants on Humans Rights as binding within the national legal regime or give priority to other international human rights instruments. Yet, other national constitutional documents explicitly defer more broadly to international law or provide more narrowly for the interpretation and application of the national rights catalogue in accordance with the Universal Declaration of Human Rights.

would be naïve to assume that all these items are “transplanted” like tomatoes. While rights standardize problems of life in society as well as their legal answers in a manner that appears to be conducive to their transfer across national boundaries, rights also change their meaning in the process. “First Amendment” guarantees and rights to equality come with a different doctrinal apparatus, different exceptions, and different connotations in India, Afghanistan, Albania or socialist constitutions.

That transfer means more than transplant or simple export/import is illustrated, incidentally, by the rather spectacular adoption by the English Parliament, contested by a divided Tory opposition, of the Human Rights Act (HRA) in 1998. The HRA incorporated the European Convention on Human Rights (ECHR) into a constitutional regime widely believed to be unwritten and based on an amalgam of parliamentary conventions and acts, court decisions, and works of authority.⁸³ Official recognition of the European Court of Human Rights’ jurisprudence as a source of inspiration for the interpretation of the Act ended a long struggle against the Convention and the Court in Strasbourg carried on by the greater part of the English political and juridical elite who seemed to have forgotten that the ECHR of 1950 was significantly shaped by their country-fellows. In the end the HRA was accepted by part of the political elite as a “lawyer’s provision for lawyers,”⁸⁴ thus changing the “original meaning” of the ECHR, while religiously repeating the two-tiered rights structure, to wit, setting out the right in the first paragraph and limiting it in the second in the name of an interest of the general public: national security, public safety or economic well-being, prevention of disorder and crime, protection of health and morals, and of the rights and freedoms of others.⁸⁵ Moreover, the “homecoming” of the ECHR in the guise of the HRA has triggered a series of “juridification” moves regarding the

⁸³ Barnett H. *Constitutional and Administrative Law*, 5th edn, Cavendish. 2005, 8; Barendt E. ‘Is There a United Kingdom Constitution?’ *Oxford Journal of Legal Studies* 137 (1997).

⁸⁴ Young J. ‘The Politics of the Human Rights Act’ 26 *Journal of Law and Society* 27, (1999): 37.

⁸⁵ The British Institute of Human Rights, *Briefing on the Human Rights Act*, 16 May 2006 www.blink.org.uk/docs/bihr_hra_briefing.pdf.

British Constitution: a process of adaptation on the part of the host culture arguably underscored by European integration and globalization.⁸⁶ This process has not even come to an end yet, as is illustrated by the recent discussion of the desirability of a Supreme Court.⁸⁷

VIII. THE MERCHANTS OF TRANSFER

To validate the existence a global constitutional reservoir, an endless list of transfers would have to be and could be provided. At this point it may suffice to summarize that, *first*, contrary to a widespread belief, constitutions are not “largely invented”⁸⁸ by societies or great minds but are largely (re-)constructed. *Second*, the (re-)construction is done or supported by the merchants of transfer coming from the “small worlds”⁸⁹ of constitutional elites and their advisors, activists of social movements with a constitutional-political agenda, and networks experts within and without academia. They all tap the global reservoir, where packaged constitutional information is pooled and held on store. Its contents is created and constantly changed by innumerable transnational transfers and the ensuing *bricolage*.

This is why, *third*, most constitutions have adopted the vocabulary, grammar, style and design of the modern idiom. Rather than desperately trying to be ingenious, the merchants of transfer stick to what they find in the IKEA market – archetypical formats, architectural designs, and semantic paragons. They observe the architectural rules demanding the configuration of rights, values, organizational provisions, and meta-rules. Despite such semblance of similarity on the propositional level, one should bear in mind, though, that texts of norms,

⁸⁶ Peters, *supra*, note 39, 275.

⁸⁷ Gernot Sydow G. “Der geplante Supreme Court für das Vereinigte Königreich im Spiegel der britischen Verfassungsreform” *ZaöRV* (2004): 66; Peters *supra*, note 39, 275.

⁸⁸ Milsom S.F.C. *Historical Foundations of the Common Law*. London 1969. ix, quoted approvingly by Watson, *Legal Transplants* (n 4) 8.

⁸⁹ “Small worlds“ of constitutional elites, experts, engineers or activists facilitate transfer of information, Stichweh, *supra*, note 23, 7 with further references.

upon their on-site unpacking, adaptation and re-contextualization, are submitted to intensive *bricolage* and then re-invested by local interpreters and appliers with meanings according to epistemological assumptions (*Vorverständnis*), conventions shared by the epistemic community, and political projects to be translated by the constitution into a normative order.

Therefore, the interesting question is not really whether legal transplants are possible (*sensu strictu* Legrand they are not) but *how* legal transfer happens and *what* happens when it happens: Which semiotic relationships are established through transfer? How are constitutional items de- and re-contextualized? Which elements are excluded for what reasons from transfer? etc.

The IKEA theory has been introduced to help formulate questions and indicate problems arising from and related to constitutional (or other legal) transfer as well as to provoke exactly the kind of inspiring conversation we had during the September 2011 workshop⁹⁰ and we the authors continue here in this book.

⁹⁰ The workshop on “Constitutional Transfers“ in Frankfurt/Bad Homburg was sponsored by the Fritz Thyssen Foundation (Cologne/Germany) and the Cluster of Excellence Normative Orders at the Goethe University Frankfurt.